

In the Matter of Merchant Mariner's Document No. Z-687527 and all
other Seaman Documents
Issued to: DOMINGO R. MARTINEZ

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1014

DOMINGO R. MARTINEZ

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 1 November 1957, an Examiner of the United States Coast Guard at New York, New York, suspended Appellant's seaman documents upon finding him guilty of misconduct. Two specifications allege that while serving as a messman on board the American SS SANTA ANA under authority of the document above described, on or about 14 August 1957, Appellant wrongfully addressed the ship's Purser with vile and obscene language; Appellant assaulted and battered the Purser.

Appellant was represented by counsel and entered pleas of not guilty to the charge and specifications. The Purser and the ship's carpenter, who was an eyewitness to most of the events in question, appeared as witnesses for the Investigating Officer. A statement by the Colombian Customs Official with the Purser at the time was stipulated in evidence. In defense, Appellant and another crew member, who was not a witness to the events in issue, testified. Appellant denied that he called the Purser bad names. Appellant stated that he did not hit the Purser but might have touched him because Appellant was afraid and tried to cover his face when the Purser raised his hands as though to strike Appellant.

After considering the evidence, the Examiner announced the decision in which he concluded that the charge and two specifications had been proved. An order was entered suspending all documents, issued to Appellant, for a period of two months outright from 24 October 1957 and four months on twelve months probation from 24 December 1957.

The decision was served on 1 November 1957. appeal was timely filed on 12 November. Appellant was issued a temporary document on 18 November 1957.

FINDINGS OF FACT

On 14 August 1957, Appellant was serving as a messman on board the American SS SANTA ANA and acting under authority of his Merchant Mariner's Document No. Z-687527 while the ship was in the port of Cartagena, Colombia.

At approximately 2030 on this date, the ship's Purser, accompanied by a Colombian Customs official, passed first through the crew pantry and then the adjoining messroom on the way to the ship's office. The Purser had noticed several native stevedores standing in the passageway at the doorway to the pantry although they were not permitted in the pantry. Appellant was in the messroom as the Purser and the Customs official passed through. Also present were the ship's carpenter and several other members of the crew playing pinochle. The Purser asked Appellant to close the pantry door so as to keep the stevedores out of the pantry. Appellant replied that he did not work after 1800 and commenced addressing the Purser in vile and obscene Spanish language. By this time, the Purser was in the passageway outside the messroom. He stopped and exchanged insulting remarks with Appellant in Spanish.

The Purser then re-entered the messroom and walked toward Appellant who was about six feet inside the doorway and facing the Purser. The loud voices of both men attracted the attention of the carpenter who turned and watched them. The Purser's hands remained open and at his sides as he approached to within about two feet of Appellant. Both men were very angry and excited but they did not appear to be violent. Appellant, who had remained standing in the same place, raised his right arm to a horizontal position in front of him and struck the Purser a light blow on his left temple at a point even with the Purser's eyeglasses. Appellant did this by raising his arm rather slowly and delivering the blow with the palm of his hand. The Purser's glasses were knocked askew but did not fall off. An able seaman stepped between the two men. Appellant did not make any further threatening gesture toward the Purser, who adjusted his glasses and left the messroom with the Customs official. The latter had remained in the passageway observing part of these events before following the Purser back into the messroom.

Appellant's prior disciplinary record consists of an admonition in 1955 for participating in a fight on board ship.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that the Examiner's conclusions are not supported by the testimony of the ship's carpenter which the Examiner stated in his decision that he accepted. The contradictions between the testimony of the carpenter, on the one

hand, and the testimony of the Purser in conjunction with the statement of the Colombian Customs official, on the other hand, cannot be overlooked because they pertain to basic and important facts.

The carpenter testified that he did not understand the Spanish language; and that all the words exchanged the Appellant and the Purser were spoken in Spanish. Appellant denied using vile and abusive language. Therefore, the Purser's uncorroborated testimony that Appellant used vile and obscene language should not be believed since other portions of his story, which contradicted the account given by the carpenter, were rejected.

It is admitted that Appellant touched the Purser and knocked his glasses askew. But Appellant is not guilty of assault and battery because he swung his arm as a defensive measure to protect himself. The doubt created by the carpenter's testimony, as to the purpose of Appellant's overt act, should be resolved in favor of Appellant.

In conclusion, it is respectfully submitted that the decision of the Examiner should be reversed.

APPEARANCE: Sheldon Tabak, Esquire, of New York City, of Counsel.

OPINION

The issues on appeal narrow down to whether the Purser's testimony should be accepted as to the type of language he claims was used by Appellant and whether the carpenter's testimony is adequate to prove the other specification alleging assault and battery. For the reasons stated below, it is my opinion that both specifications are supported by substantial evidence contained in the record.

Appellant accepts the judgement of the Examiner that the carpenter "gave an honest, straightforward and accurate account of what actually took place." The carpenter's testimony was contradicted by Appellant's statements in his favor as much as it was contradicted by the Purser's version which was unfavorable to Appellant. Some of the differences are minor discrepancies attributable to human error as a result of the admittedly angry and excited condition of both the Purser and Appellant. More important contradictions are probably due to the personal desires of Appellant and the Purser to justify their conduct. Appellant's testimony is somewhat incoherent and inconsistent while the Purser's testimony is equally evasive and vague on some points.

Ordinarily, the judgement of the Examiner, who saw and heard the witnesses, will be accepted with respect to issues of credibility. There is the additional factor in the case that the carpenter was the only eyewitness who testified at the hearing other than the two immediate participants. There is no reason to believe that his testimony was not impartial and unbiased. Since it appears that the carpenter's version was accepted by the Examiner, it is agreed to by Appellant, and it is the testimony most likely to present the true facts, the above findings of fact are based largely on the testimony of the carpenter. Two important exceptions concern the nature of the language used by Appellant and the return of the Customs official to the messroom.

One specification alleges that Appellant addresses the Purser with vile and obscene language. The carpenter testified that all the words spoken were in Spanish which he did not understand. Accepting this, I see no good reason to reject the Purser's testimony that Appellant's language was vile and obscene. The Examiner substantially adopted this testimony in his findings and it does not contradict the carpenter but only the Appellant. Such testimony is not uncorroborated as contended on appeal. The Customs official with the Purser said in his statement that Appellant used vile and obscene language. Appellant's denial is totally unsupported.

The statements by the Purser and Customs official that some of the language was in Spanish and some in English may have been due to error on their part due to the prevailing excitement. They understood both languages and might easily have been confused when trying to recall such a minor detail as the language spoken by Appellant.

The Customs official could see and hear what was going on between the other two men while he was still in the passageway. Apparently, the carpenter did not identify the Customs official as one of the persons in the messroom because his return thereto some time after the Purser re-entered the messroom was not noticed by the carpenter. Consequently, this probable error by the carpenter, when he was concentrating his attention on Appellant and the Purser, does not cast any reflection upon the veracity of the Customs official's statement. The conclusion that the specification was proved is up held.

It is also my opinion that the specification alleging assault and battery was properly found proved on the basis of the carpenter's testimony which is closely followed in the above findings of fact. His testimony is clear that the Purser made no attempt to strike Appellant although the former advanced toward the latter. The Purser's hands were open and at his sides. The

movement of Appellant's arm and hand resulted in his palm striking the Purser on the temple. It was not a hard blow but it had sufficient force to knock the Purser's glasses at an angle. It is difficult to understand how this result could have been attained if Appellant's intention was simple to raise his arm across his face as a purely defensive measure. If this were so, there is little possibility that his palm would have struck the Purser on the side of the head. Similarly, there probably would have been no indication to the able seaman, who stepped between them, of a need to take such action unless the move by Appellant appeared to be an offensive gesture which might be followed by more blows. On appeal, it is admitted that Appellant knocked the Purser's glasses askew. Considering these factors, there is not much doubt that Appellant was guilty of assault and battery.

Despite the minor nature of the battery involved, this is a serious matter because the Purser is a staff officer who frequently represents the Master in his dealings with the crew and native officials in foreign countries. The Purser is not a licensed officer but he is entitled to greater respect, in the interest of shipboard discipline, than the average unlicensed crew members.

Although it will not affect the action taken herein, it is pointed out that the Examiner should not have prevented the Investigating Officer from questioning Appellant about his prior record of 1955 for the offense of participating in a fight aboard another ship. Prior disciplinary records may not, as a general rule, be revealed to the Examiner until at least one charge has been found proved (46 CFR 137.09-70). But prior acts of misconduct, involving a specific trait of character related to the act charged, may be introduced as substantive evidence upon the question of guilt or innocence if the accused has offered evidence of his good character. Wigmore on Evidence, 3d Edition, secs. 58-9, 890-1, 925. Since evidence as to Appellants good character had been placed in evidence, the objection to this line of questioning should not have been sustained by the Examiner. This is an entirely different question than the one presented in Commandant's Appeal no. 846 where Appellant's record was properly brought out on cross-examination after he had denied, on direct examination, having a prior record.

ORDER

The order of the Examiner dated at New York, New York, on 1 November 1957, is affirmed except to provide that the two months outright suspension shall be considered to have commenced on 1 November, the date of service of the Examiner's decision, rather than on the retroactive date of 24 October 1957. Appellant shall be given credit for the time between these two dates for the

periods of time when his document was in the custody of the Examiner or other Coast Guard personnel.

As so modified, the order is AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 4th day of April, 1958.